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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER IX

RESERVATIONS TO TREATIES

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A. Introduction

1. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

2. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[1]

3. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[2]

4. Following this discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read: "Reservations to treaties"; the form the results of the study would take; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[3] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994.

5. In 1995, the Commission, in accordance with its earlier practice,[4] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it "to continue its work ... along the lines indicated in its report" and also inviting States to answer the questionnaire.[5]

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[1] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 382.

[2] A/CN.4/470 and Corr.1.

[3] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 491.

[4] See Yearbook of the International Law Commission, 1995, vol. II (Part Two), para. 286.

[5] As at 30 June 1998, 32 States and 22 international organizations had answered the questionnaire.

6. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic.[5] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[6] Owing to the lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

7. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

8. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[7]

9. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

B. Consideration of the topic at the present session

10. At the present session, the Commission had before it the Special Rapporteur's third report on the topic, which mainly dealt with the definition of reservations (and of interpretative declarations) to treaties (A/CN.4/491 and Add.1-5). It considered this report at its 2541st, 2542nd, 2545th and 2548th meetings, held on 4, 5, 10 and 12 June, respectively.

1. Introduction by the Special Rapporteur of his third report

11. In introducing his third report, the Special Rapporteur recognized the delicate and difficult aspects of the topic from the point of view of legal technique. His report was divided into two chapters. The first was devoted to the earlier work of the Commission on the topic, and the second to the

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[5] A/CN.4/477 and Add.1.

[6] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 137.

[7] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), para. 157.

definition of reservations (and interpretative declarations) and to reservations (and interpretative declarations) to bilateral treaties.

(a) The earlier work of the Commission on the topic and reactions from States and organizations consulted

12. The Special Rapporteur referred to the Commission's previous work,[9] drawing attention to its two main decisions. First, in principle and subject to an unlikely "state of necessity", the Commission would not call into question the provisions of the Vienna Conventions on reservations to treaties and would simply try to fill the lacunae and, if possible, to remedy the ambiguities and clarify the obscurities in them. Secondly, the work would lead to the preparation of a Guide to Practice, a set of guidelines which would be grafted onto the existing provisions, filling the lacunae therein, and would, if necessary, be accompanied by model clauses relating to reservations which the Commission would, as appropriate, recommend to States and international organizations for inclusion in treaties they would conclude in future.

13. The Special Rapporteur discussed the action taken[10] on his second report[11] and on the principal reactions to the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. He recalled that two schools of thought had emerged from the debates on the preliminary conclusions endorsed by the Commission, which had been adopted without a vote. On the one hand, a clear majority had felt that the Commission had already taken a big step forward in recognizing that the human rights treaty monitoring bodies were competent to comment upon and express recommendations with regard to the permissibility of reservations by States[12] and in calling upon States to cooperate with monitoring bodies and to give due consideration to their recommendations. On the other hand, a second group had urged the Commission to go further and recognize that monitoring bodies had the right to draw the consequences of their findings, following the example of the European Court of Human Rights (Belilos case).

14. The Special Rapporteur felt that the divergence of views paralleled the division of States in the Sixth Committee, but along different lines. About half the States that had given their views on that point had approved the preliminary conclusions, while the other half had expressed reservations on the ground that States alone were competent, not only to determine the consequences of the possible impermissibility of a reservation, but even to find a reservation to be impermissible. The Special Rapporteur was convinced that it was part of the Commission's role to suggest progressive alternative solutions

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[9] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10).

[10] A/CN.4/491, paras. 9-30.

[11] A/CN.4/477 and Add.1.

[12] See Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52.10), para. 157, para. 5 of the preliminary conclusions.

to States, provided they corresponded to trends that were desirable and had already taken reasonable shape. He drew the Commission's attention, however, to the opposition shown by States to the breakthroughs being recommended by some of its members in respect of human rights monitoring bodies.

15. The Special Rapporteur also said that he had so far received a response only from the Chairperson of the Human Rights Committee, who had sent in some initial comments on paragraph 12 of the preliminary conclusions, pointing out in that regard that universal monitoring bodies played no less important a role than regional bodies in the process by which the relevant practices and rules were developed.[13]

16. However, the Special Rapporteur considered it premature to reopen the debate on the preliminary conclusions, which the Commission would have to consider again; it would do well to wait, on the one hand, for the comments from States[14] and human rights bodies which it had requested, even if that meant reiterating the request, and, on the other hand, until the consideration of the question of the permissibility of reservations and reactions to them had been completed.

17. The Special Rapporteur said he had been favourably impressed by the interest which States had shown in the Commission's work on reservations to treaties. That interest was illustrated not only by the large number of statements made in the Sixth Committee, but also by the work done on the topic by the Asian-African Legal Consultative Committee and the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI), which had established a group of specialists on reservations to international treaties.[15]

18. Another proof of such interest was the large number of replies received from States (32) and international organizations (22) to the questionnaire on the topic. While expressing the hope that an even larger number of States and international organizations would reply, the Special Rapporteur regretted the silence of the European Communities thus far, which were not only depositaries, but also parties to many multilateral treaties.

19. Chapter II of the report was comprised of two sections, the first dealing with the definition of reservations to treaties and of interpretative declarations, and the second being devoted to reservations and interpretative declarations to bilateral treaties. Owing to lack of time, the Special Rapporteur had been unable to deal with "alternatives to treaties", as he had originally planned.

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[13] A/CN.4/491, para. 16.

[14] Four States had answered the questionnaire thus far, namely, China, Liechtenstein, Morocco and Switzerland.

[15] A/CN.4/491, paras. 27-30.

(b) Definition of reservations to treaties and of interpretative declarations

20. The Special Rapporteur had taken as his starting point the definition of reservations in the three Vienna Conventions, of 1969, 1978 and 1986, and, to begin with, that contained in article 2, paragraph 1 (d) of the 1969 Convention on the Law of Treaties. Referring to the travaux préparatoires which had led to the adoption of that definition,[16] he made three comments:

(a) The definition of reservations had not given rise to lengthy discussion when the 1969 Vienna Convention was being drawn up;

(b) The contractual definition of reservations proposed by the first Special Rapporteur, James Brierly, whereby they were understood as offers to other contracting parties, had evolved into the idea of a unilateral statement;

(c) The definition of reservations had gradually become separate from that of interpretative declarations and reactions to such declarations. The last Special Rapporteur, Sir Humphrey Waldock, considered that interpretative declarations belonged in the chapter relating to interpretation.

21. The Special Rapporteur noted that the codification, in the next two Vienna Conventions, of the law of treaties concluded by international organizations and on State succession in respect of treaties had had implications for the definition of reservations itself (art. 2, para. 1 (d) of the 1986 Vienna Convention and art. 2, para. 1 (j) of the 1978 Convention).

22. The result of the various contributions had been that none of the three Vienna Conventions gave a comprehensive definition of reservations, and the Special Rapporteur had therefore drafted a composite text[17] combining all the contributions. The resulting definition, which he called the "Vienna definition", could be used at the beginning of chapter I of the Guide to Practice.

23. In discussing the background and elements of the definition, the Special Rapporteur recalled that it had been adopted without significant doctrinal or political debates[18] and that, in the three conventions, it had been placed under the heading "Use of terms" (rather than "Definitions"), to show clearly that the definitions contained therein were only "for the purposes of the present Convention". Nonetheless, State practice and judicial decisions had conformed that definition without worrying whether or not the Vienna Conventions were actually applicable in the situations in which States used the definition. Thus, States explicitly invoked it in their practice inter se, particularly when converting an interpretative declaration into a reservation or in their pleadings in contentious cases. As for judicial decisions, suffice it to recall, among others, the case concerning the Delimitation of the Continental

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[16] A/CN.4/491/Add.1, paras. 53-68.

[17] Ibid., para. 82.

[18] Ibid., para. 53.

Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (the Mer d'Iroise case) in 1977, the Temeltasch case before the European Commission of Human Rights in 1982 and the Inter-American Court of Human Rights in its 1983 opinion on restrictions on the death penalty.

24. The Special Rapporteur noted that contemporary doctrine was almost unanimously in favour of the Vienna definition, which had acquired its "letters of nobility" and was the obligatory starting point for any consideration of the definition of reservations, even though some writers still proposed their own definitions. Nonetheless, according to the Special Rapporteur, certain problems persisted, and hence the Commission could make a useful contribution by refining and supplementing the Vienna definition.

25. To that end, the Special Rapporteur pointed out that the Vienna definition contained three formal components: a unilateral statement; the moment when the State or international organization expressed its consent to be bound by the treaty; and its wording or designation. It must also contain a substantive element, namely, that the reservation was intended to exclude or to modify the legal effect of certain provisions of the treaty.

(i) Unilateral statement

26. A reservation did not necessarily have to have the formal nature of a unilateral statement. The first Special Rapporteur, James Brierly, had had a "contractual" (or "conventional") conception of reservations, believing that they represented an agreement among the parties whereby they limited the effects of the treaty in its application to one or more of them. That conception, which was incompatible with the Vienna regime, was subsequently discarded. Although the relevant articles were silent on the form that the statement must take, the Special Rapporteur felt that it had to be written, as expressly stated in article 23 of the 1969 and 1986 Conventions. However, he also warned against taking an unduly formalistic approach to the "unilateralism" of reservations, in respect of both similar reservations made by States with special ties of solidarity and reservations formulated jointly by several States.[19] It would therefore be useful to indicate in the Guide to Practice that such practices were not incompatible with the definition of reservations; that was the purpose of draft guideline 1.1.1.

(ii) Moment of formulation of a reservation

27. The Special Rapporteur drew attention to the fact that, in the Vienna definition, the long list of moments when reservations could be made was neither exhaustive nor rigorous. Even if there were elements that related more to the legal regime of reservations, the emphasis placed on the moment served to prevent the potential parties to a treaty from formulating reservations at any time at all, something that would create great insecurity in contractual relations. Nevertheless, it would be better to specify that the list in

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[19] For example, the States of the European Union, which make, if not reservations, at least interpretative declarations and joint objections.

article 2, paragraph 1 (d) was the same in spirit as that in article 11, and that was the purpose of draft guideline 1.1.2.

(iii) Reservations having territorial scope

28. In that context, the Special Rapporteur recalled that a reservation could also be made at the time of the notification that the application of a treaty extended to a territory, an action which, in itself, did not of course constitute a reservation. That practice had so far not given rise to any objections, a fact which had led him to formulate draft guideline 1.1.3. On the other hand, as could be seen from article 29 of the Vienna Convention, a statement by which a State purported to exclude the application of a treaty to a territory meant that it sought "to exclude or to modify" the legal effect which the treaty would normally have, and such a statement therefore constituted, according to the Special Rapporteur, a "true" reservation, rationae loci (draft guideline 1.1.8).

(iv) Wording or designation

29. The last formal component of the Vienna definition, related to the condemnation of "legal nominalism" reflected in the phrase "however phrased or named", was largely established in practice and should have a counterpart in interpretative declarations; however, it does not call for any particular draft guideline.

(v) Exclusion or modification of the legal effect of certain provisions of the treaty

30. The substantive element of the Vienna definition was "teleological" in nature (the reservation purported "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization"). It presented technical and complex problems.

31. The first set of problems was created by the expression "certain provisions", in respect of which it had been proposed - wrongly, according to the Special Rapporteur - that the word "provisions" should be replaced by the word "obligations".[20] On the other hand, there were in practice "transverse" reservations which related not to any particular provision, but, for example, to the way the State or international organization which had formulated it intended to implement the treaty as a whole or which consisted of excluding certain categories of persons from the application of the treaty. That practice was reflected by draft guideline 1.1.4.

32. A second set of problems was raised by the objective pursued by the author of the reservation. The Special Rapporteur noted that it was that feature which distinguished reservations from interpretative declarations or reservations relating to non-recognition which, in reality, did not constitute reservations when their authors did not intend to produce any kind of effect on the treaty itself or to rule out the application of the treaty in their relations with the

[20] For example, P.-H. Imbert; see document A/CN.4/491/Add.2, paras. 72-88.

non-recognized party. On the contrary, a statement did constitute a genuine reservation when the author stated that it did not accept any contractual relation with the entity it did not recognize, because such an act then had a direct impact on the application of the treaty as between the two parties. That type of unilateral statement could be formulated when the non-recognized entity became a party to the treaty, i.e., after the expression by the author of its consent to be bound by it (draft guideline 1.1.7).

(vi) "To exclude or modify" - "extensive" reservations

33. The precise contours of the expression "extensive reservations" raised very sensitive problems and had led to doctrinal controversy.[21] More particularly, the Special Rapporteur wondered whether the expression could also cover an extension of the rights or obligations of the author, a point on which the doctrinal debate was rather obscure. In his view, if what was involved was a unilateral commitment by the formulating State to go beyond what the treaty imposed on it, such a commitment did not constitute a reservation within the meaning of the Vienna definition because its possible binding force was not based on the treaty. In fact, ratification, signature or accession were merely an opportunity for the State which made the statement to make a unilateral commitment and, if it was bound, it was only for the reasons put forward by the International Court of Justice in the 1974 Nuclear Tests case (draft guideline 1.1.5).

34. On the other hand, if a State or international organization sought, by means of a reservation, to limit the obligations imposed on it by the treaty and, as a corollary, to limit the rights which the other contracting parties derived from the treaty, its statement constituted a reservation. Although a State could not, by means of a reservation, impose on other parties to the treaty a new obligation in respect of the obligations of general international law, the reserving State could nevertheless, through its reservation, deny other parties to the treaty the rights which they had, not under general international law, but solely by virtue of the treaty. On the other hand, the State could not "legislate" and attempt by means of a reservation, to impose obligations on other States which did not stem from general international law (draft guideline 1.1.6).

In conclusion, the Special Rapporteur proposed that the Commission might refer the eight draft guidelines of the Guide to Practice to the Drafting Committee.

2. Summary of the debate

See document A/CN.4/L.562/Add.1.

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[21] A/CN.4/492/Add.1, paras. 72-88.

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CHAPTER IX

RESERVATIONS TO TREATIES

Paragraph 10

Insert the following text at the end of the paragraph:

The Commission decided to transmit draft guidelines 1.1 (Definition of reservations), 1.1.1 (Joint formulation of a reservation), 1.1.2 (Moment when a reservation is formulated), 1.1.3 (Reservations formulated when notifying territorial application), 1.1.4 (Object of reservations), 1.1.5 (Statements designed to increase the obligations of their author), 1.1.6 (Statements designed to limit the obligations of their author), 1.1.7 (Reservations relating to non-recognition), 1.1.8 (Reservations having territorial scope), 1.2 (Definition of interpretative declarations) and 1.4 (Scope of definitions) to the Drafting Committee.

At its 2558th meeting, held on 7 August 1998, the Commission considered and adopted draft guidelines 1.1 (Definition of reservations), 1.1.1 [1.1.4] (Object of reservations), 1.1.2 (Cases in which a reservation may be formulated), 1.1.3 [1.1.8] (Reservations having territorial scope), 1.1.4 [1.1.3] (Reservations formulated when notifying territorial application), 1.1.7 [1.1.1] (Joint formulation of a reservation) and a draft guideline with no title or number concerning the relation between the definition and the permissibility of reservations. The text of these draft guidelines and of the commentaries relating thereto is reproduced in section C below.

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CHAPTER IX

RESERVATIONS TO TREATIES

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1. Introduction by the Special Rapporteur of his third report (continued)

1. In introducing the part of his report covering the distinction between reservations and interpretative declarations (A/CN.4/491/Add.4), the Special Rapporteur made three general statements:

(a) First, the three Vienna Conventions were silent on the question of interpretative declarations,[1] whereas the Commission had studied the matter in 1956 and 1962 while developing its draft articles on the law of treaties. While the silence on the part of the Vienna Conventions had drawbacks, such as a lack of guidelines and pointers, it did have the advantage that, unlike the case of reservations, there was no conventional wisdom about interpretative declarations. The Commission could therefore innovate on the basis of its members' convictions and the needs of contemporary international society;

(b) Second, there was abundant practice[2] proving that States used interpretative declarations as widely as they did reservations. The practice was of very long standing, going back to the Final Act of the Congress of Vienna in 1815, and had developed in parallel with the traditional multilateral format;

(c) Third, defining interpretative declarations was made more difficult by two complicating factors, (i) unclear terminology and (ii) States' foreign policies and legal strategies. In the former case, the question arose of whether it did not smack too much of Cartesian rationalism to analyse unilateral declarations that affected the treaties about which they were made by setting up an opposition, in binary mode, between "reservations" and "interpretative declarations". Indeed, even though some languages seemed to have adopted the binary mode, others, English for example, seemed to have a much more diverse approach. Nevertheless, none of the States - including the English-speaking ones - or the international organizations that had replied to the questionnaires had taken issue with classifying unilateral declarations into two categories.

2. The terminology was no less unclear as a result, however, and it did happen that States either did not qualify their declarations at all or used various tortuous or ambiguous forms of words.[3]

3. Ambiguous wording was indeed an example of the unclear terminology difficulty: even if such forms of words were used inadvertently sometimes, they were very often used deliberately either to get round a prohibition on reservations or, as one State said in its response to the questionnaire, to avoid creating the bad impression that making a reservation might.

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[1] Some States, such as Japan, found this regrettable.

[2] See A/CN.4/491/Add.4, paras. 236-239.

[3] See A/CN.4/491/Add.4, paras. 261-266.

(c) Definition of interpretative declarations

4. The Special Rapporteur pointed out that interpretative declarations had been given a "negative" definition - as not being reservations - during the travaux préparatoires for the 1969 Vienna Convention and indicated that he had arrived at a positive definition by empirical means (draft guideline 1.2). The definition contained elements that were common both to reservations and to interpretative declarations: they were both unilateral declarations, however phrased or named.

(i) Joint formulation of interpretative declarations

5. Joint formulation was one of the points in common between reservations and interpretative declarations, but practice for the latter was well established[4] (draft guideline 1.2.1).

(ii) Phrasing and name - interpretative declarations where reservations are prohibited

6. The Special Rapporteur mentioned the repudiation of nominalism in the definition both of reservations and of interpretative declarations ("however phrased or named"), and wondered whether States should not be taken at their word by holding to whatever name they gave their unilateral declarations [as Japan recommended in 1969 and in accordance with a suggestion from a member of the Commission in 1997]. However, he recognized that such an approach would be very far removed from practice and would be equivalent to the Commission's making law, which was not its function. He had therefore adopted a more realistic approach by taking as his basis the judicial decisions of the Human Rights Committee, the Commission on Human Rights and the European Court of Human Rights, and he proposed taking the view that even if the title of an interpretative declaration did not prove what its legal nature was, it did create a presumption - not an irrefragable one, however - particularly when the author [of such a declaration] entitled some declarations "reservations" and others "interpretative declarations" (draft guideline 1.2.2).

7. Similarly, when reservations were prohibited under a treaty, it would seem that there were grounds for presuming, again not irrefragably, that the author of an interpretative declaration with the same object had acted in good faith and had made what was indeed an interpretative declaration (draft guideline 1.2.3).

(iii) Conditional interpretative declarations

8. A conditional interpretative declaration occurred when the State or international organization making the declaration subordinated its consent to be

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[4] See A/CN.4/491/Add.4, para. 275.

bound by a treaty to its own interpretation, in the same way that the author of a reservation made the reservation the condition for being so bound.[5]

9. Such a declaration was much closer to a reservation than a simple interpretative declaration, and the temporal element was therefore essential, which it was not for simple interpretative declarations. Also, if any uncertainty existed about the exact scope of interpretative declarations or about their nature, conditional or otherwise, the general rule of interpretation set out in article 31 of the Vienna Convention, supplemented if necessary by the additional means provided for under article 32 of the same Convention, must be used (draft guideline 1.2.4).

(iv) Declarations of general policy and informative declarations

10. Declarations of general policy had the same object as the treaty, but their aim was not to interpret the treaty but to set out the author's policy towards the object of the treaty (draft guideline 1.2.5).

11. In an informative declaration, a State indicated how it intended to discharge its obligations at the internal level, with no impact on the rights and obligations of the other States (draft guideline 1.2.6).

12. Neither of the above was a reservation or an interpretative declaration.

(v) Distinction between reservations and interpretative declarations

13. Interpretative declarations differed from reservations in two ways: (a) the temporal element, in other words the moment when the declaration could be made, and (b) the teleological factor, the author's purpose in making that declaration. The latter was the crucial factor: while a reservation sought to exclude or modify the legal effect of the treaty's provisions in their application to the author, an interpretative declaration sought only to interpret the treaty or some of its provisions, i.e., to clarify its meaning or scope, as had been affirmed on many occasions in the decisions of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). The interpretation thus accepted the provisions to which it referred as well as their legal effect. The Special Rapporteur pointed out that the latter was quite clear in the definition of an interpretative declaration (1.2) but that if the Commission so desired, it could be restated even more explicitly in guidelines clearly defining the criteria for both reservations and interpretative declarations (draft guidelines 1.3.0 and 1.3.0 bis). Although there were advantages and disadvantages in both explaining and not explaining the criteria, States must be made aware of that point in the Guide to Practice.

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[5] The Special Rapporteur gives as an example the declaration by France on signing Additional Protocol II of the Treaty of Tlatelolco.

14. The Special Rapporteur was of the opinion that the temporal element, unlike in the definition of reservations,[4] should not be included in the general definition of interpretative declarations (with the exception of conditional interpretative declarations). Although reservations were made upon concluding the treaty, interpretative declarations dealt with the interpretation of the treaty, which was itself an aspect of its implementation, a point on which the Special Rapporteur agreed with his predecessor, Sir Humphrey Waldock, who held that interpretative declarations could be made at any time - during negotiations, when signing or ratifying, or later during ensuing practice.

(vi) Method of distinguishing between reservations and interpretative declarations

15. The Special Rapporteur indicated that the method could in fact follow the model set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, containing the general rule of interpretation of treaties. By following not only the practice of States but, especially, the judicial decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the arbitral tribunal set up to hear the Mer d'Iroise case, unilateral declarations must be interpreted in good faith in accordance with the meaning to be given to the terms in their context, pending verification of the result obtained by this method through recourse to supplementary interpretative measures, in particular the travaux préparatoires (draft guideline 1.3.1).

(vii) Scope of the definitions

16. Referring to questions raised concerning the permissibility of reservations during the Commission's discussion of the definition of a reservation, the Special Rapporteur pointed out that a definition was not a binding provision and that all the definitions contained in the first part of the Guide to Practice were without prejudice to their legal scope or, especially, their permissibility. A reservation (or an interpretative declaration) could be permissible or impermissible but nevertheless remained a reservation or interpretative declaration. The very fact that a unilateral declaration was defined as either a reservation or an interpretative declaration conditioned its permissibility (draft guideline 1.4).

17. The Commission decided to refer draft guidelines 1.1, 1.1.1 to 1.1.8, 1.2 and 1.4 to the Drafting Committee.

18. At the ... meeting of the Commission, the Chairman of the Drafting Committee introduced the draft guidelines adopted by that Committee, the texts of which, along with comments and references, with the exception of draft guidelines 1.1.7 and 1.2, could be found in section C below.

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[4] The Special Rapporteur even felt that the inclusion of the temporal element in the definition of reservations was unwise and due rather to reasons of legal policy related to the stability of treaty relations and the unity of treaties.

2. Summary of the debate

19. With regard to draft guideline 1.1.7, several members, while recognizing the practicality of a clarification of the nature of statements of non-recognition, wondered if they were really reservations. They pointed out that it was the application of the treaty as a whole, and not specific provisions of it, that was excluded between the party making the statement and the non-recognized party, which did not follow the Vienna definition to the letter. Furthermore, it had been observed that any reservation assumed a treaty-based or contractual relationship between the reserving party and the other parties to the treaty, while in the case of statements of non-recognition, it was in fact the contractual capacity of a party that had been denied. Consequently, such statements belonged more in the area of recognition or interpretative declarations than in treaty law, particularly as it pertained to reservations. They were simply made at the moment when the State expressed its consent to be bound by the treaty. It was also noted that the discussion had left the realm of treaty law and had entered a highly political area, where a distinction must be made between non-recognition of States, of Governments and also of international organizations. Since the practice of that type of statement was sufficiently widespread, participation by a larger number of States in treaties should not be discouraged by a "preventive" qualification.

20. According to another point of view, the draft guideline went far beyond the Vienna regime and could give the impression that the Commission intended to include the greatest possible number of situations under the regime on reservations. In that regard, the view had been expressed that if such statements could be made at any time at all, they were even farther removed from the "classic" characteristics of reservations. Moreover, such statements could prove to have varied effects depending on the type of treaty (for example restricted treaties) to which they were made. It was also stated that classifying them as reservations and attempting to apply that regime to them could sometimes lead to absurd results, for example in a case where reservations were prohibited by the treaty or when mutual recognition among all the parties was lacking.

21. In the view of some members, the question should be asked in the opposite way: could a reservation exclude the application of the treaty in its totality between two parties? If so, it was a question of knowing if that was necessarily related to an act of non-recognition. The possibility was raised of linking such statements to "offers" or agreements inter se. It was also suggested that the phenomenon should be discussed further or studied at the same time as interpretative declarations.

22. Other members stated that it was a question of unilateral declarations, sui generis, "statements of exclusion", or statements producing effects similar to reservations which still should have a place in the Guide to Practice (perhaps in an annex) because they expressed an indisputable reality. The view was also expressed that they constituted statements of refusal of the capacity of the non-recognized entity to enter into treaty relations, falling rather within the province of the conclusion of treaties, and that the draft guideline should say specifically that such statements did not constitute reservations.

23. On the other hand, to some members, those statements constituted true reservations, in that they were aimed at modifying the legal effect of the treaty, which was the function of a reservation. Nevertheless, the general regime of reservations was not entirely applicable: the treaty as a whole was excluded, and the moment of formulation of the statements could vary. In that regard, the members recalled that although recognition was a political matter, it had legal effects.

24. Summarizing the debate, the Special Rapporteur noted that five main issues had been raised:

(a) The first was a philosophical problem: even if it was a "political" matter, as several members seemed to believe, he thought that it should be discussed in an effort to determine its legal consequences;

(b) Besides their being currently named "reservations", which was an indication in that direction, he did not see why reservations could not be made rationae personae as well as rationae materiae or rationae loci. Moreover, if a State could exclude the application of a treaty as a whole between two parties by means of an objection, he wondered why it could not also do so by means of a reservation. It seemed to him too formalistic to adhere strictly to the wording "certain provisions" as contained in the Vienna definition;

(c) However, he recognized that even by calling such statements reservations, some characteristics of the regime of reservations (objections and others) could not be applied to them;

(d) The problem of the exact moment when such statements could be made remained unresolved; in order to protect the stability of treaty relations, the Commission would do well to specify that they might be made at the time when the non-recognized entity became party to the treaty, and not at any time whatsoever;

(e) As the sui generis "qualifications" were unsatisfactory, in his view, he would be inclined to think that, if such statements were not actually reservations, they could be thought of as statements similar to declarations of general policy or statements made in relation to the treaty which did not produce legal effects on its application, although he would reserve judgement on that point.

25. With regard to the introduction of the part of the report concerning interpretative declarations (A/CN.4/491/Add.4), several members said they agreed with the Special Rapporteur's view that the greatest confusion of terminology could be found in the area of interpretative declarations, and, they thought that draft guidelines 1.2 and 1.2.2 clarified the matter and helped to avoid vague and ambiguous situations. From one point of view, besides the problem of terminology, the definition played an essential role in the determination of the permissibility of a unilateral declaration. However, support had been expressed for the Special Rapporteur's view that interpretative declarations must first be defined before problems of permissibility could be tackled. It had also been pointed out that the Vienna regime was not entirely silent concerning interpretative declarations, general rules of interpretation and content

applicable to them. Nevertheless, the distinction between interpretative declarations and reservations was sometimes very difficult to make. It had also been noted that the general rules of interpretation contained in the Vienna Convention were intended to clarify the meaning of an agreement of intentions between two or more parties, and the Commission should think about whether it would be possible to transpose them to interpretative declarations, i.e., to unilateral statements.

26. Other members wondered if it was necessary to study interpretative declarations in detail and had subsequently decided that it was, stressing that there must be a clear definition of the criteria for distinguishing them from reservations. (All the Special Rapporteur's proposals, with the possible exception of that contained in draft guideline 1.2.1, on the joint formulation of an interpretative declaration, were in fact aimed at such a definition of criteria.) The view was expressed, however, that conditional interpretative declarations constituted genuine reservations and should be treated as such, especially with regard to their conformity with the object and purpose of the treaty.

27. With regard to conditional interpretative declarations, the question was asked as to whether, if another contracting party had raised an objection, such declarations would be an obstacle to the entry into force of a treaty between the author of the conditional declaration and the objecting State.

28. As to the definition of interpretative declarations (draft guideline 1.2), several members felt that it met the need to clear up misunderstandings surrounding the notion of interpretative declarations. It was also noted that the definition could be matched with its negative "counterpart", namely, that interpretative declarations purported neither to modify nor to exclude the legal effect of certain provisions of the treaty.

29. Other members said that a limit must be placed on the far too subjective power of interpretation (introduced especially by the expression "attributed by the declarant"), saying that the interpretation should conform to the letter and spirit of the corresponding provision of the treaty.

30. From another point of view, interpretative declarations often dealt with the conditions of implementation of the treaty (as in the 1982 Convention on the Law of the Sea), and that element could also be included in the definition.

31. Summarizing the debate, the Special Rapporteur noted that, in essence, a definition did not have normative content as such, but that it was an essential prerequisite for determining the permissibility of unilateral declarations and the application of the legal regime relating to both. The main problem was obviously to determine whether the legal regime was transposable to that of interpretative declarations, and to what extent. But it was too soon to undertake that debate. For his part, he felt that although in many cases the regime of conditional interpretative declarations could be brought into line with that of reservations, it did not seem possible to completely assimilate the two notions.

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER IX

RESERVATIONS TO TREATIES

Addendum

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Summary of the debate (continued)

1. With regard to draft guidelines 1.1.5 and 1.1.6, which deal with the problem of so-called "extensive" reservations, certain members pointed out that statements designed to increase the obligations of their author (as in the case of the South African statement concerning the General Agreement on Tariffs and Trade (GATT), which was cited by the Special Rapporteur[1]) were extremely rare; this type of statement could be either a proposal to extend a treaty, which could be accepted or not by the other States parties, or an interpretative statement, giving an extensive - even if erroneous - interpretation of the obligations of its author under the treaty. With regard to draft guideline 1.1.6, certain members noted that the draft guideline gave only an a contrario definition of reservations, particularly in the light of the principle of reciprocity, which is strictly applied in conventions, and that it was very similar to the general definition of reservations. Moreover, several members stated that it was impossible, strictly speaking, to "add a new provision to the treaty" by means of a simple unilateral statement.

2. Other members drew attention to the problems caused by the wording of both draft guideline 1.1.5 and draft guideline 1.1.6. Mention was made of a hypothetical case of a reservation to a particular treaty suspending the application of a general regime deriving from international law: such a reservation would revive the obligations deriving from general international law. On the other hand, in the case of a treaty that prohibited reservations but permitted statements of a "transitional" nature designed to limit the scope and nature of the obligations imposed by the treaty (as in the recent example of the Rome Statute establishing an International Criminal Court), it might be asked whether there were two regimes - one applicable to reservations and the other to statements - or whether there was only one option available to States. The opinion was also expressed that the two draft guidelines could be combined into a single guideline dealing mainly with the "modification" of the treaty itself (and not of its effects) by means of a statement that did not constitute a reservation. In the view of certain members, the problems raised by these two draft guidelines went far beyond simple drafting problems. Indeed, they were not convinced by the distinction made in draft guidelines 1.1.5 and 1.1.6 between unilateral statements that constitute reservations and those that do not. As far as the theory of law was concerned, there was no substantial difference between a statement limiting and a statement increasing the obligations imposed on their author. In this regard, the question was raised, since the Vienna definition refers only to "modifying", why one should exclude from the definition of reservations statements designed to increase the obligations of their author and which could, if the case arose, as a result of reciprocity, increase the obligations of the other parties as well.

3. Other members, on the other hand, believed that the two draft guidelines could be very useful in the Guide to Practice, since they dealt with statements designed to increase the obligations of their author and with statements designed to limit the obligations of their author, which therefore constituted reservations. While it was not necessary at the current stage to decide on the

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[1] A/CN.4/491/Add.3, para. 213.

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nature of the first type of statements (if, for example, they were governed by rules applicable to unilateral legal acts), the concept of reservations would thus be clarified. In this regard, the question was also raised of the possibility of substituting certain obligations under the treaty with others that were more or less equivalent.[2]

4. Summarizing the debate, the Special Rapporteur first stressed the true meaning of the terms used in the Vienna definition. It seems incorrect to state that a reservation can or cannot exclude provisions of a treaty or to maintain that the Vienna Conventions define reservations as limiting the legal effect of a treaty's provisions. "Modify" is the word used, hence the problem of extensive reservations.

5. Secondly, the Special Rapporteur said that he believed that statements designed to increase the obligations of their author constituted unilateral legal acts even if several members considered that the Commission should not take a decision on their nature at the current stage. His comment dealt with the question of whether a State could, by means of a reservation, increase the obligations of other States: according to the Special Rapporteur, two very different aspects must be distinguished:

(a) The first was to determine whether a reservation could increase the obligations of the parties normally deriving from the treaty. There is no doubt that this is the normal function of any reservation designed to neutralize certain provisions of the treaty;

(b) The second aspect concerns the possibility, for the reserving State, to increase the obligations of its contracting partners, not only with respect to the treaty but also with respect to general international law. It is hard to imagine that a State could modify customary international law to its benefit by making a reservation. It seems unreasonable to consider that a modifying "reservation" could increase the rights of the reserving State and the obligations of the other contracting States under customary international law; moreover, the designation of such practices as "reservations" would have very serious consequences for small underdeveloped States which, lacking highly organized legal services, would be deemed to have accepted such reservations after a certain period of time: they would also be bound by a sort of "legislation" that would be imposed on them from outside.

6. Thirdly, the Special Rapporteur noted that several unilateral statements called "reservations" by their authors (as, for example, Israel's reservation to the 1949 Geneva Conventions seeking to add the Star of David to the emblems of the Red Cross[3]) are in fact - whether designed to increase or to limit the

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[2] Mention was made of a reservation by Japan to the Food Aid Convention of 1971 (under which the contracting parties pledged to supply wheat to certain countries) by means of which Japan, not being a wheat producer, stated that it would supply a quantity of rice equivalent in "monetary" terms to the quantity of wheat that it would have had to supply.

[3] A/CN.4/491/Add.3, para. 225.

obligations of the other contracting States - proposals on amendment that enter into force only if they are accepted by the other parties. Given the tacit acceptance of reservations, the problem was to determine whether such "reservations" were true reservations.